84-585

No. 84- .

Office-Supreme Court, U.S.
FILED
OCT 10 1984
ALEXANDER L. STEVAS,
CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

JOSEPH LOMBARDO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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Questions Presented.

1. Did the court below err in holding that knowing participation in a conspiracy to bribe a United States Senator was sufficiently established by evidence of the defendant's "presence plus suspicious circumstances," where there was no evidence that Petitioner knew of the conspirators' intent to influence the Senator's official acts and where five Circuits have rejected the "presence plus suspicious circumstances" test as improper?

2. Did the court below err in holding that the subjective standard of recklessness developed in the First Amendment libel context applies to a claim under *Franks* v. *Delaware*?

3. Did the court below err in holding that the plain view doctrine permitted the seizure, analysis, and introduction of electronically intercepted conversations which were outside the scope of a wiretap warrant and which were not 'immediately incriminatory'?

4. Did the court below err in upholding the validity of a wiretap extension application which did not contain the statement of results required by 18 U.S.C. § 2518(1)?

Parties Below.

Other parties to the proceeding in the court below were Roy L. Williams, Thomas F. O'Malley, and Andrew G. Massa. Petitioner hereby adopts the arguments made in the petitions for a Writ of Certiorari of co-defendants.

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No. 84- .

In the
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OCTOBER TERM, 1984.

JOSEPH LOMBARDO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Opinions Below.

The Opinion of the Court of Appeals for the Seventh Circuit is reported at 737 F.2d 594 (7th Cir. 1984) and is reproduced at page 1a of the Appendix to the petition for a Writ of Certiorari of Petitioner's co-defendant Roy L. Williams. Williams' petition was filed in this case on August 16, 1984, No. 84-256 and Petitioner hereby adopts its Appendix. The Opinion of the Court of Appeals denying rehearing is unreported, and is reproduced at page 42a of the Appendix to Roy L. Williams' petition. The Opinion of the District Court is reported at 542 F.Supp. 345 (N.D. Ill. 1982) and is reproduced at page 44a of the Appendix to Roy L. Williams' petition.

All references in this petition to opinions of the courts below refer to page numbers in the Appendix to the Williams petition.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on June 8, 1984. Rehearing was denied on July 12, 1984. Petitioner moved for an extension of time within which to file his petition for a Writ of Certiorari, and by order dated August 24, 1984, this Court extended the time within which to file the Petition to October 10, 1984. This Court has jurisdiction to review the judgment by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved.

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U S.C. § 201(b) provides:

§ 201. Bribery of public officials and witnesses

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent —

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty,

18 U.S.C. § 2518(1), provides, in pertinent part:

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * *

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

Statement of the Case.

I. *Introduction.*

This is the first case, to Petitioner's knowledge, where a defendant has been convicted of conspiracy to bribe a Senator where there is no evidence that the defendant knew that the thing of value which was being offered to the Senator was in exchange for a specific *quid pro quo*. To fill this evidentiary gap — indeed this absence of a required element of the crime of bribery — the Seventh Circuit employed an erroneous evidentiary standard rejected by five other circuits. The result has been the conviction of a man who is innocent of the crime charged. The Court of Appeals also erroneously applied the First Amendment libel test for "reckless disregard for truth" in the wholly inapplicable context of the Fourth Amendment test for determining whether a government agent's false statements to a magistrate meet the *Franks* v. *Delaware* standard. The resulting tragedy of the lower court's use of both these erroneous standards is that Petitioner has been sentenced to fifteen years of imprisonment on the basis of a far lower standard of knowledge than that imposed on a government agent who submitted a false affidavit. Because the standard of knowledge required for conviction of a serious felony must be higher than that required for the invocation of a prophylactic rule designed to protect constitutional values, there is something seriously askew in the Court of Appeals' selection of standards for review in this case.

II. *Facts.*

Petitioner and four others were charged with conspiracy to bribe a United States Senator, interstate travel to promote the bribery, and wire fraud.[1] Essentially, the government charged that defendants agreed to assist Senator Howard Cannon to purchase certain real estate as an inducement for the Senator's promise to oppose legislation to deregulate the trucking industry.

[1] The other defendants were Allen Dorfman (who was killed after trial and prior to sentencing), Roy L. Williams, Andrew G. Massa and Thomas F. O'Malley. Williams was an international vice president of the Teamsters Union; O'Malley and Massa were current and former trustees of the Teamsters Pension Fund; Dorfman's company insured many Pension Fund assets. Petitioner was not shown to have any connection to the Teamsters or the Teamsters Pension Fund.

Defendants' trial lasted almost two months. The government introduced hundreds of taped conversations obtained through fourteen months of continuous electronic surveillance which resulted in the recording of over 20,000 hours of conversations. Much of the testimony focused on a January 10, 1979 meeting between Senator Cannon and several others (not including Petitioner Lombardo) at which the agreement was allegedly reached, on subsequent conversations and meetings regarding the proposed legislation, and on a series of bids made on the real estate, known as the "Wonderworld" property.

The government has conceded that the only evidence connecting Petitioner Lombardo to the alleged conspiracy was five brief taped conversations. Petitioner was not present at the January 10th meeting or at any other meetings. The five conversations contain no reference to any attempt to influence the Senator, no reference to the January meeting, and no reference to deregulation of the trucking industry or to any pending legislation. At most, the evidence reflected that Petitioner suggested to Allen Dorfman two people who might be able to negotiate successfully with Allen Glick, a bidder on the Wonderworld property, to withdraw his bid. Petitioner neither arranged nor attended the meeting with Glick. All of the five conversations introduced against Petitioner are consistent with his innocence of all charges.

Despite the paucity of the evidence against Petitioner, he was convicted on eleven counts and sentenced to a prison term of fifteen years.

On appeal, Petitioner argued that there was insufficient evidence to support his conviction because there was absolutely no evidence that he knew the illegal nature or goal of the conspiracy, which was to obtain the Senator's opposition to deregulation legislation in exchange for assistance with Wonderworld. The Court of Appeals agreed that the government must prove such knowledge, but held that knowledge, can be inferred from minimal evidence:

> the quantum of proof that the government must produce is not great; presence has been sufficient evidence of knowing participation in a conspiracy when there were suspicious circumstances, and the existence of the conspiracy was already established.

(A. 36a.)[2]

[2] All page references are to page numbers in the Appendix to Roy L. Williams' Petition for a Writ of Certiorari, filed in this case August 16, 1984. Petitioner hereby adopts the Williams appendix.

Applying this "presence plus suspicious circumstances" test, the court found that there was sufficient evidence to support an inference that Petitioner knew of the plan to offer something of value to the Senator because other defendants solicited and relied on Petitioner's advice and because Petitioner referred to "the Cannon deal" — a perfectly innocent term — in a subsequent conversation dealing with the management of the Teamsters Pension Fund's assets (A. 36a-37a). The court could not, and did not, advert to any evidence indicating that Petitioner was aware of the conspiracy's intent to influence the Senator's official actions regarding deregulation of the trucking industry — the only fact that would convert otherwise innocent conduct into a felony.

Other issues on appeal concerned the District Court's refusal to suppress the results of electronic surveillance conducted pursuant to a March 1, 1979 wiretap extension authorization. The March 1 wiretap application, which named Petitioner as a party whose conversations were to be intercepted, sought a 30-day extension of a January 29 order authorizing wiretaps on all telephones at Allen Dorfman's place of business. In its initial application, the government had asserted that the wiretap was necessary to its investigation of Dorfman's purported hidden interests in Nevada casinos. The March 1 extension application and affidavit repeated the "hidden interest" allegations and, in addition, alleged that the initial wiretap had intercepted conversations which "concerned the promotion and management of hidden and unlawful interests in the Aladdin hotel-casino." The March 1 extension application did not contain a statement of results thus far obtained or an explanation for the failure to obtain results, although such a statement is required by 18 U.S.C. § 2518(1)(f). The judge granted the extension order. At petitioner's trial, fourteen conversations intercepted and recorded during this period were introduced against him.

In fact, as both the District Court and the Court of Appeals found, as of March 1, no conversations substantiating any "hidden interest" allegations had been intercepted (A. 13a, 65a). The "Aladdin allegations," which provided the sole basis for a finding of probable cause, also "proved to be false"

(A. 10a, 11a). As of March 1, Special Agent Peter Wacks, who drafted and signed the affidavit, *knew* that allegedly ambiguous conversations about real estate bids did not concern the Aladdin but "some 'golf course' property," eventually determined to be Wonderworld (A. 13a).

Prior to trial, Petitioner and his co-defendants moved to suppress on the ground that the March 1 wiretap extension application and affidavit failed to include the required statement of results, and contained material misstatements made intentionally or with reckless disregard for the truth. A suppression hearing was held. The District Court held that although the application did not contain a statement of results, suppression was not required because the application contained an independent basis for probable cause (A. 78a-81a). The District Court also held that, although the affidavit did contain material misstatements, suppression was not required because the statements had not been made intentionally or recklessly (A. 85a-90a). In so concluding, the District Court relied on case law, developed in First Amendment libel cases, which construed the phrase "reckless disregard for truth" to require a showing of subjective bad faith, that is, that the speaker "in fact entertained serious doubts as to the truth of his allegations" (A. 67a-69a).

On appeal, Petitioner objected to the application of the First Amendment standard in a wiretap warrant case. The Court of Appeals found that the challenged statement was both false and material, but agreed with the District Court that the First Amendment standard was applicable and that under that subjective test, recklessness had not been shown (A. 11a-13a). Petitioner and his co-defendants also objected to the refusal to suppress despite the failure to include a statement of results. The Court of Appeals agreed with the District Court that because the wiretap application would have provided the basis for an original grant of authority, suppression was not required for failure to include a statement of results (A. 10a). In addition, Petitioner and his co-defendants argued that 33 conversations introduced at Petitioner's trial should have been suppressed because they were unrelated to the crimes specified in the

wiretap authorization and because they were not immediately incriminatory, and were therefore not within "plain view." The Court of Appeals found that the plain view doctrine was probably inapplicable to electronic surveillance, but that the government's seizure, analysis and introduction of the conversations were permissible under that doctrine (A. 15a-19a).

Reasons for Granting the Writ.

I. THE COURT'S HOLDING THAT KNOWING PARTICIPATION IN A CONSPIRACY IS SUFFICIENTLY ESTABLISHED BY EVIDENCE OF THE DEFENDANT'S "PRESENCE PLUS SUSPICIOUS CIRCUMSTANCES," CONFLICTS WITH THE RULINGS OF FIVE OTHER CIRCUITS, EFFECTIVELY ELIMINATES AN ESSENTIAL ELEMENT OF THE CRIME, AND VIOLATES THE CONSTITUTION'S REQUIREMENT THAT A CONVICTION BE HAD ONLY ON PROOF BEYOND A REASONABLE DOUBT OF EACH ELEMENT OF THE CRIME CHARGED.

The Court below employed an improper legal standard and thus erred in ruling that there was sufficient evidence to sustain the conviction of Petitioner Lombardo. Its decision conflicts with decisions of other Circuits holding that bribery prosecutions require clear evidence of specific knowledge of the official act to be influenced. *See, e.g. United States* v. *Myers*, 692 F.2d 823 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 2437 (1983); *United States* v. *Brewster*, 506 F.2d 62 (D.C. Cir. 1974).

The decision below also utilizes the "presence plus suspicious circumstances" test to measure the sufficiency of the evidence connecting Petitioner to the conspiracy. Under this test, once the conspiracy has been established, only "slight evidence" is necessary to connect an alleged conspirator to it. At least five Circuits have explicitly rejected this test, holding

that, while a "slight *connection*" to the conspiracy may be sufficient, the government must introduce evidence demonstrating that connection beyond a reasonable doubt. "Thus, the word 'slight' properly modifies 'connection' and not 'evidence.'" *United States* v. *Dunn*, 564 F.2d 348, 357 (9th Cir. 1977). By adopting the "presence plus suspicious circumstances" test, the decision makes a nullity of the Constitutional requirement, articulated in numerous decisions of this Court, that all criminal convictions be based on proof beyond a reasonable doubt — not just slight evidence — of each element of the crime, including the element of knowledge.

It is axiomatic that to convict a defendant of conspiracy, the government must connect the defendant to the conspiracy by proving that he knew its essential nature.[3] The "essential nature" of a conspiracy to bribe a U.S. Senator is the corrupt intent to influence an official act. 18 U.S.C. § 201(b)(1). Under the bribery statute, the knowledge requirement is critical: "the evidence must show 'specific knowledge of a definite official act' for which payment is made." *United States* v. *Myers*, 692 F.2d at 845, citing *United States* v. *Brewster*, 506 F.2d at 81. It is not enough knowingly to offer "something of value" to a Senator. Defendant must intend that the bribe be the prime mover or producer of the official act; indeed, "it is this element of *quid pro quo* that distinguishes the heightened criminal intent requisite under the bribery sections of the statute. . ." *United States* v. *Strand*, 574 F.2d 993, 995 (9th Cir. 1978). *See also United States* v. *Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980) ("money must be given [not just with] generalized hope of ultimate benefit" but with "the intent and design to influence official action in exchange for the donation.")[4]

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[3] As the court below properly noted, "[a] person is not a co-conspirator, of course, if he is unaware of the 'essential nature' of the conspiracy" (A. 35a).

[4] Under 18 U.S.C. §§ 201(b), (c) and (d), the bribery portions of the statute, the thing of value must be given or accepted "corruptly" and "with intent to influence" or "in return for" being influenced. Under 18 U.S.C. § 201(f) and

In this case, the alleged conspiracy consisted of the offer of something of value to the Senator — assistance to his homeowners group in acquiring the Wonderworld property — *in exchange for a quid pro quo* — the Senator's opposition to statutory deregulation of the trucking industry. The court below rejected Petitioner's claim that there was insufficient evidence of knowledge despite the complete absence of any evidence suggesting that Petitioner was aware of the *quid pro quo*.

In rejecting Petitioner's challenge to the sufficiency of the evidence connecting him with the conspiracy, the court below stated:

> [T]he quantum of proof that the government must produce is not great; "[p]resence has been sufficient evidence of knowing participation in a conspiracy when there were suspicious circumstances, and the existence of the conspiracy was already established." *United States* v. *Dalzotto*, 603 F.2d 642, 645 (7th Cir.), *cert. denied*, 444 U.S. 994 (1979); *see United States* v. *Holmes*, 452 U.S. 249, 255-56 (7th Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972).

(A. 36a).

Applying this test, the court analyzed the evidence, and concluded that Petitioner knew of the plan to assist the Senator's

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(g), the gratuity portions, no specific intent is required. It is sufficient that the thing be given or accepted "otherwise than as provided by law for the proper discharge of official duty." *See United States* v. *Strand*, 574 F.2d at 995 n.2. A bribery conviction carries a penalty of up to 15 years in prison; an illegal gratuity conviction up to two years. 18 U.S.C. § 201.

As the District of Columbia Circuit noted in *United States* v. *Brewster*, 506 F.2d at 78, the statute is not "a model of clarity and nicely drawn distinctions." It "does cause great difficulty for a trial judge" who must "draw a tripartite distinction between conduct with the defined intent to constitute an offense under the bribery section (c), conduct with the requisite intent to constitute an offense under the gratuity section (g), and conduct with an intent which constitutes no offense at all," *id.* at 78-79. Drawing this "tripartite" line is a delicate task, and one which turns solely on distinctions between levels of knowledge and intent.

group to purchase the Wonderworld property and thus *to offer a thing of value to the Senator* (A. 37a).

However, the Court could not, and did not, advert to *any* evidence showing that Petitioner was aware of the conspirators' intention to obtain a legislative *quid pro quo* for their offer. No such evidence was introduced at trial, despite the fact that such knowledge is precisely what distinguishes innocent from guilty conduct under the bribery statute. As if evidence of such knowledge were unnecessary, the court held that the jury could *infer* that Petitioner knew that "the favor was intended to influence an official act" merely "from the secretive nature of the operation (A. 37a).[5] This "inference" is wholly improper. Where, as here, knowledge or intent is an essential element of the crime, it may not be presumed or inferred from proof of "additional facts not themselves establishing the element of intent." *Sandstrom* v. *Montana*, 442 U.S. 510, 524 (1979). Moreover, the "operation" in question of course, was the attempt to assist with the Senator's acquisition of Wonderworld, and an attempt to assist done in secret does not mean that the assistance is necessarily part of an illegal scheme, and certainly not the particular illegal scheme charged here.[6] Otherwise, any

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[5] To support its conclusion, the court noted vaguely that "a co-conspirator need not know the details, . . . or every objective of the conspiracy" so long as he knows "the kind of criminal conduct . . . in fact contemplated" (A. 37a). Yet the court did not point to any evidence linking the defendant to any "criminal conduct contemplated" regarding deregulation. As if aware that a critical link was missing, the court added in a footnote that "there was sufficient evidence, in any event, to support the jury finding that Lombardo was aware of the intent of the co-conspirators to influence Senator Cannon's actions on deregulation" (A. 37a n.14). The footnote neither noted nor described *any* such evidence, and there was none. The mere assertion, without more, that such evidence exists, is of course an inadequate response to petitioner's claim of insufficiency.

[6] Petitioner was charged with conspiracy to bribe, not to give an illegal gratuity. The bribery section requires proof of "corrupt intent." See footnote 4, *supra*. If he were, in fact, guilty of the lesser offense of giving an illegal gratuity, obviously there would be a reason to keep the transaction secret. Thus, the "secretive nature of the operation" certainly gives rise to no proper inference that Petitioner was guilty of the felonious conspiracy charged.

act of charity, generosity, or selflessness done quietly, without fanfare or publicity, would be suspect, as would an act of political influence peddling that was entirely lawful, if not necessarily laudable.

The court's willingness to uphold Petitioner's conviction and fifteen year sentence despite the lack of evidence that he knew of the *quid pro quo* requested in exchange for assistance with Wonderworld, poses the clear danger that Petitioner has been, and future defendants may be, convicted for engaging in conduct which is not only legitimate, but laudable. It is of course legal to use one's business connections to help a group of homeowners (even one headed by a Senator) to purchase a property to prevent it from becoming a high-rise development. It is also legal to wish to remain anonymous while doing so, yet that is all the evidence against Petitioner shows. The thing which distinguishes such conduct from illegal bribery is the presence or absence of an intent to influence the Senator's official actions in exchange for the help, and there was no evidence here of such an intent on the part of Petitioner Lombardo, or of knowledge on his part that others had such an intent.[7]

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[7] As the District of Columbia Circuit recognized, "Every campaign contribution is given to an elected public official probably because the giver supports the acts done *or to be done* by the elected official." *United States* v. *Brewster*, 506 F.2d at 73 n.26 (emphasis supplied). If however, the contribution is made *in consideration of* official support for specific legislation, it is an illegal gratuity. If the contribution is made *in exchange for* official support for specific legislation, it is an illegal bribe, because the contribution does not merely reward the official act but is the prime mover in producing it. *Id.* at 80-83. Thus, contributions can be made with the general expectation of future official support, but not as an inducement or reward for *specific conduct*.

Our political system depends on financial contributions by groups and individuals. Giving "something of value" to elected officials whose views are in accord with the giver's is both protected political expression and a necessary source of campaign support for the official. In this case, the Court of Appeals upheld Petitioner's conviction solely because he knew that "something of value" was given to the Senator. If this were enough to sustain a conviction, then every political contributor would be liable to prosecution. "No politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation. There must be more specific knowledge of a definite official act for which the contributor intends to compensate before an official's act crosses the line between guilt and innocence." *Id.* at 81. Yet it is precisely that "specific knowledge" which is missing here.

Unless courts are vigilant in requiring evidence of such intent, defendants may be convicted for wholly innocent acts.[8] Consider for example, two farmers who illegally agree with a Senator to contribute something of value to his campaign *in exchange for* his support for increased farm subsidies. The thing of value is funneled to the Senator through a farmers' special interest PAC. Under the theory of the court below, the officers of the PAC could be liable for bribery because they knew that the PAC gave something of value to the Senator, although they had no knowledge whatsoever of the individual contributors' intent to obtain specific legislative support in exchange for it. Petitioner's position is like that of the PAC officers: he *knew* he was assisting the Senator to acquire Wonderworld but he *did not know* that the conspirators intended to obtain specific legislative support from the Senator in exchange for the assistance.

In a recent "Abscam" case, where a defendant Congressman argued that "there was an undue risk that the jury might convict him simply for engaging in the normal congressional activities of meeting with people who might invest in his district and advising people on immigration matters," the Second Circuit held that the risk was properly dealt with and eliminated when the court "focused the jury's attention squarely on whether Murphy *knew*" that he was accepting money for his otherwise legal assistance. *United States* v. *Myers*, 692 F.2d at 845 (emphasis added).[9]

In this case, the Court of Appeals not only failed to focus on the critical element of knowledge, but, by adopting the "presence plus suspicious circumstances" test, it effectively

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[8] The *quid pro quo*-knowledge requirement in the bribery statute is especially important in prosecutions for conspiracy to bribe. Without strict enforcement of the knowledge requirement, any person who joins in any *legal* act performed by the conspirators may be liable as a conspirator, whether or not he knows of the conspiracy's existence.

[9] *See also United States* v. *Spock*, 416 F.2d 165 (1st Cir. 1969) (specific intent to further illegal aspects of agreement may not be inferred from fact that defendant participated in drafting legal portions of document).

eliminated the knowledge element altogether. Under that test, once the government has introduced proof beyond a reasonable doubt that the conspiracy existed, it need not prove beyond a reasonable doubt that the defendant knew of the conspiracy or was connected to it. Instead, the government need only introduce "slight evidence" of the defendant's connection.

The "slight evidence" rule is used by the Sixth, Eighth, and Tenth Circuits. *See United States* v. *Hamilton*, 689 F.2d 1262, 1275 (6th Cir. 1982); *cert. denied*, 459 U.S. 1117 (1983); *United States* v. *Richmond*, 700 F.2d 1183, 1190 (8th Cir. 1983); *United States* v. *Boothman*, 654 F.2d 700, 703 (10th Cir. 1981).

The rule has been rejected by the Third, Fourth, Fifth, Ninth, and Eleventh Circuits. *See United States* v. *Cooper*, 567 F.2d 252, 253 (3d Cir. 1977); *United States* v. *Laughman*, 618 F.2d 1067, 1076 (4th Cir.), *cert. denied*, 447 U.S. 925 (1980); *United States* v. *Malatesta*, 590 F.2d 1379, 1381-82 (5th Cir.) (*en banc*), *cert. denied*, 440 U.S. 962 (1979); *United States* v. *Spetz*, 721 F.2d 1457, 1478 (9th Cir. 1983); *United States* v. *Dunn*, 564 F.2d 348, 357 (9th Cir. 1977); *United States* v. *Bulman*, 667 F.2d 1374, 1377-78 & 1377 n.2 (11th Cir.), *cert. denied*, 456 U.S. 1010 (1982).

Those circuits *rejecting* the rule require that, "[t]o convict on [a] conspiracy count, proof *beyond a reasonable doubt* must show that the conspiracy existed, that the accused knew of it, and that, with knowledge, the accused voluntarily became a part of it." *United States* v. *Rackley*, 724 F.2d 1463, 1470 (11th Cir. 1984) (emphasis added). As the Third Circuit stated in *Cooper*: "[Cases referring to 'slight evidence'] cannot be understood to establish the novel rule that the prosecution in a conspiracy case is relieved of the burden of proving every element of the offense beyond a reasonable doubt. Clearly, it would be reversible error to charge a jury that, once the government has shown the existence of a conspiracy, it may connect a particular defendant to it by 'slight evidence' rather than by

evidence proving the connection beyond a reasonable doubt." *United States* v. *Cooper*, 567 F.2d at 253. Yet, what the Third Circuit has termed "clearly . . . reversible error" is precisely what was done by the Seventh Circuit in this case.

This case presents an appropriate opportunity for this Court to resolve the conflict among the circuits with respect to the quantum of evidence necessary to connect a defendant to a proven conspiracy. The "presence plus suspicious circumstances" test should be rejected as a patent violation of the Due Process Clause requirement that no person be convicted "except upon proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970) (emphasis added); *Jackson* v. *Virginia*, 443 U.S. 307, 315 (1979). Knowledge of a conspiracy's essential nature is such a "necessary fact."

In this case, the Court's use of the "presence plus suspicious circumstances" test was particularly inappropriate. Here, the element of knowledge was not simply one among several equally important elements in the government's case. It was the *critical* element, the one which transforms legitimate political assistance into illegal bribery. To utilize a test which, in effect, *presumes* knowledge from proof of other elements of the crime, is to permit the government to dispense with proof of the most important element of its case.

II. The Court's Holding That the Subjective Standard of Recklessness Developed in the First Amendment Libel Context Applies to a Claim Under *Franks* v. *Delaware* Cannot Be Squared With Constitutional and Statutory Principles, Conflicts With Decisions of Other Circuits and With the Reasoning of a Recent Decision of This Court.

In *Franks* v. *Delaware*, 438 U.S. 154 (1978), this Court held that the fruits of a search based on a warrant affidavit

which has been demonstrated to contain intentional or reckless material misstatements must be suppressed. The Fourth Amendment "would be reduced to a nullity," this Court found, if a government affiant could deliberately or recklessly use falsehoods to obtain a warrant, "and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile." *Id.* at 168. The independence of the magistrate's determination of probable cause is so fundamental to the integrity of our legal system that to usurp his function, whether intentionally or recklessly, wreaks an "unthinkable imposition on his authority." *Id.* at 165. The continuing vitality of *Franks* was recently affirmed in *United States* v. *Leon*, 104 S.Ct. 3405 (1984) which stressed that suppression would remain the appropriate remedy for *Franks* violations, although the exclusionary rule would no longer be applied where a facially defective warrant was executed in good faith. *Id.* at 3421.

Since *Franks*, courts have frequently been asked to determine whether or not false statements in search warrant and wiretap affidavits were made with "reckless disregard for the truth." In defining "recklessness," however, the courts have been left strictly to their own devices. As the District of Columbia Circuit recently lamented: "Unfortunately, the Supreme Court in *Franks* gave no guidance concerning what constitutes a reckless disregard for truth in fourth amendment cases, except to state that 'negligence or innocent mistake [is] insufficient'." *United States* v. *Davis*, 617 F.2d 677, 694 (D.C. Cir. 1979). *See also United States* v. *Namer*, 680 F.2d 1088, 1094 (5th Cir. 1982) (*Franks* and its progeny offer "little guidance" in determining recklessness.) In this case, the Court below put its quandary succinctly: "We know what intentional lies are, but the meaning of 'reckless disregard for the truth' is not self-evident, and the Court in *Franks* did not define the concept" (A. 11a). In attempting to fill that gap, courts have adopted conflicting and, in this case, inappropriate definitions.

Having recognized that the *Franks* opinion left a significant concept thus undefined, the Court below noted that the Su-

preme Court "has clarified the notion of reckless disregard in the context of First Amendment cases involving libel" (A. 11a). Without further ado, and without attempting to refute the strong objections made in Petitioner's brief, the Court concluded that "the First Amendment definition should be applied by analogy in the *Franks* setting" (A. 11a). The Court then cited this court's decision in *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968), for the proposition that "reckless disregard" requires proof that the affiant "in fact entertained serious doubts as to the truth of his" allegations (A. 11a).

Petitioner contends that this "First Amendment" test is wholly inappropriate for evaluating *Franks* claims, and that this Court never intended that it be applied "by analogy" to such claims. Petitioner further contends that, had the court applied an appropriately objective definition of recklessness his motion to suppress would have been granted, or at the very least, the case would have had to be remanded for reconsideration.

The *St. Amant* test focuses on the speaker's subjective state of mind. Unless the libel plaintiff can prove that the defendant *knew* the statement was *probably* false, the publication will not be found to be defamatory. *St. Amant*, 390 U.S. at 731. This test deliberately imposes an extraordinarily difficult burden on a libel plaintiff, but one required by the First Amendment. Because the right to unhindered speech is among our most precious freedoms, any curtailment of that right must be restricted. In the gray area where freedom of speech and other important rights collide, we will tolerate a broad spectrum of misleading statements, and even lies; in short, we choose to err on the side of protecting speech over other interests.[10]

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[10] This Court has long recognized and upheld the unique status of First Amendment interests. In *Smith* v. *California*, 361 U.S. 147 (1959), Justice Brennan held that where First Amendment interests were at stake, the danger that self-censorship might restrict the free flow of constitutionally protected material was so great that the court must strike down a statute imposing strict liability on a seller of obscene materials, although the insistence on a scienter require-

In formulating the *St. Amant* test, this Court articulated the primacy of First Amendment freedom:

> Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But *New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.

Id. at 731-732.

In the *Franks* context, the policies behind *St. Amant* simply do not apply. Indeed, they cut in exactly the opposite direction. It is surely not "essential" that courts protect false, misleading, or "erroneous" affidavits. The government's interest in surreptitiously intercepting private communications, even as part of a criminal investigation, is not analogous to a publisher's protected right to speak out about public affairs. The First Amendment to the Constitution mandates the *maximization* of the publisher's "speech," even at the risk of publishing lies, because any restriction on publication might undermine the

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ment would permit some obscene materials to be sold. "The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." *Id.* at 155, citing *Roth* v. *United States*, 354 U.S. 476, 488 (1957).

public's access to the free flow of ideas. The Fourth Amendment mandates the *minimization* of deliberately or recklessly false or misleading affidavits, even at the risk of acquitting a guilty defendant, because the fraudulent manipulation of magistrates and judges by governmental agents threatens the integrity of the entire judicial system.[11] The number of wiretaps must also be minimized because electronic surveillance intrudes on another fundamental freedom, the Fourth Amendment right to be secure against unreasonable searches and seizures.

This court has clearly articulated the principle that Title III wiretaps should be minimized:

> Congress . . . evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation.

United States v. *Giordano*, 416 U.S. 505, 515 (1974). The Statute imposes restrictive requirements on the use of electronic surveillance, and severe sanctions for non-compliance.[12]

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[11] *See, e.g., United States* v. *Cortina*, 630 F.2d 1207, 1213-14 (7th Cir. 1980) (deliberately false affidavit commits offense against the integrity of the judicial system, and "a judicial system which condones fraud will be of little value to the individuals whose rights it is sworn to protect.")

[12] The Statute itself, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211-225, 18 U.S.C. §§ 2510-2520, is rife with provisions strictly circumscribing the government's "freedom to wiretap." Wiretap applications must contain prescribed information, 18 U.S.C. § 2518(1), the judge must make certain findings before any order may issue 18 U.S.C. § 2518(3), only the Attorney General or a specially designated Assistant Attorney General may seek a wiretap, 18 U.S.C. § 2516(1), orders must be particularized, 18 U.S.C. § 2518(4), and will expire after at most 30 days, 18 U.S.C. § 2518(5), surveillance must be judicially supervised, 18 U.S.C. § 2518(6), agents must comply with minimization obligations, 18 U.S.C. § 2518(5), and face suppression for non-compliance, 18 U.S.C. § 2518(10)(a).

In adopting the *St. Amant* test, the court below ignored the obvious conflict between First Amendment policies, on one hand, which tolerate and even encourage the publication of information which may be false, and *Franks* v. *Delaware*, Fourth Amendment, and Title III policies on the other, which discourage — indeed condemn — the submission to the magistrate of false and misleading warrant affidavits.[13]

The opinion below also fails to recognize that libel suits and *Franks* hearings differ essentially with respect to the subject of the inquiry. In *St. Amant*, this Court approved inquiries into a libel defendant's subjective intent; in *United States* v. *Leon*, *supra*, however, this Court squarely rejected the appropriateness of such inquiries when the subject is a law enforcement officer:

> [W]e believe that "[s]ending state and federal courts into the minds of police officers would produce a grave misallocation of judicial resources." (citations omitted). Accordingly, our good faith inquiry is confined to the *objec-*

[13] The inappropriateness of placing Petitioner in the shoes of a libel plaintiff is further demonstrated by the procedural differences between the two. At a *Franks* hearing, the claimant need only prove his case by a preponderance of the evidence, *Franks* v. *Delaware*, 438 U.S. at 156. In a libel case, the interests of the First Amendment require the plaintiff to prove defendant's knowledge or recklessness by clear and convincing evidence. *New York Times* v. *Sullivan*, 376 U.S. 254, 280 (1964). Even if the libel plaintiff wins, on appeal, the defendant is entitled to an independent review of the entire record to assure protection of First Amendment values. *Bose Corp.* v. *Consumers Union*, 104 S.Ct. 1949, 1965 (1984). In contrast, rulings on motions to suppress are ordinarily reversed only if "clearly erroneous." 3 Wright, Federal Practice & Procedure, Criminal 2d. § 678 at 805 (1982); *United States* v. *Ganter*, 436 F.2d 364, 368 (7th Cir. 1970). First Amendment interests, which oppose libel plaintiffs, require them to run an extraordinarily difficult race from first to last. Fourth Amendment interests, which *Franks* claimants set out to vindicate, mandate a more negotiable course.

Petitioner strenuously objects to the use of the First Amendment standard in this case. If this court should hold, however, that the standard is appropriate, petitioner wishes to join in the claim of his co-defendant, Roy Williams, that under *Bose Corp. supra*, the court below should not have applied the "clearly erroneous" standard of review.

> *tively ascertainable question whether a reasonably well-trained officer would have known* that the search was illegal despite the magistrate's authorization.

Id. at 3421 n.23 (emphasis added). The *Leon* decision repeatedly emphasized that it was setting a standard of *objective* good faith, determinable from an examination of "all of the circumstances" surrounding the case. *Id.* at 3420 n.20, 3421 n.23. Indeed, the Court held out the objective standard as an incentive to law enforcement officials to conform their conduct to a higher standard than would be required if subjective sincerity were sufficient to foreclose all Fourth Amendment claims. *Id.* at 3420 n.20. The decision of the Court below, rendered prior to this Court's decision in *Leon*, cannot be squared with this Court's stated reluctance to permit inquiries into the subjective state of mind of police officers.[14]

The opinion below conflicts not only with this Court's objective approach in *Leon*, but with the approach taken by other courts of appeal. In *United States* v. *Namer*, 680 F.2d 1088 (5th Cir. 1982), for example, the Fifth Circuit employed an objective approach in its analysis of defendant's *Franks* claim, focusing on the misleading effect of the affidavit and on the circumstances surrounding the investigation rather than on the

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[14] Had the court sought an appropriately objective definition of "recklessness" it might have looked to the law governing material misrepresentations in securities cases. An investor's right to make an informed, independent investment decision parallels the magistrate's right independently to assess probable cause. In both cases, the risk is that a recklessly misleading document will undermine the reader's ability to judge for himself; the standard therefore discourages rather than encourages misleading statements.

Liability is imposed for material misstatements made with reckless disregard for truth. Reckless conduct "represents an extreme departure from the standard of ordinary care, and which presents a danger of misleading . . . that is either known to the defendant or is so obvious that the actor must have been aware of it." *Sundstrand Corp.* v. *Sun Chemical Corp.* 553 F.2d 1033, 1045 (7th Cir. 1977). The focus is not on knowledge that the statement is false but knowledge that it is misleading.

affiant's subjective state of mind. The *Namer* opinion focuses on the meaning of "recklessness," but does not look to First Amendment cases for elucidation. Instead, the court noted that "the analytical concepts of materiality and recklessness are often bound together," and then proceeded to analyze the materiality of the misstatement in the context of the particular investigation. *Id.* at 1094. Where the misrepresentation "was a crucially material one," where the affidavit was drafted at leisure, by experienced officers as part of a lengthy investigation, and where a crucial word was used despite its obviously misleading connotations, the court concluded that the misstatement "was made, at least, with reckless disregard for the truth." *Id.* at 1094.[15] The opinion thus determined the affiant's intent using external, objective criteria.

This case presents an excellent opportunity for this Court to elucidate an important concept left undefined in *Franks*, namely, the meaning of the phrase "reckless disregard for truth." Because the court below applied the wrong definition, the convictions should be reversed. Because the evidence is clear that, under the correct standard, government agents would be found to have acted in reckless disregard for truth, Petitioner's

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[15] In *Namer*, the affiant alleged that a state official had "advised" that certain loans "are classified as securities" when in fact, as the affiant knew, the official had given only an informal opinion as to probable classification. The Court squarely rejected the affiant's contention that the words of the affidavit were technically true and therefore not in violation of *Franks*. "The word 'classified' connotes the authoritative result of ordered procedures and methodologies, not an ad hoc and qualified oral opinion of a single agency employee. The affidavit's statement is no less a misrepresentation because it manipulates the facts subtly." *Id.* at 1094. In the instant case, the allegation that certain calls "concerned" the Aladdin carried a similarly misleading connotation. Under an appropriate analysis, the affidavit would not have been saved by the agent's assertion that he privately believed the calls "concerned" hidden interests because any suspicious or ambiguous conversation might eventually be linked to the hidden interest investigation. A common-sense reading of the affidavit would necessarily induce a belief that the calls *directly* concerned hidden interests in the Aladdin. Had the correct analysis been used, the tenuous "linkage" theory would have been rejected, the misleading effect of the affidavit on the judge would have been recognized, and the result would have been suppression.

motion to suppress should be granted. In the alternative, at the very least, the case should be remanded for consideration under the correct standard.[16]

III. The Court Below Misinterpreted This Court's Decisions Defining the Parameters of the "Plain View" Doctrine.

The Court of Appeals held that under the "plain view" doctrine, the government could properly introduce thirty-three conversations recorded by government agents before they knew of or suspected the alleged conspiracy to bribe Senator Cannon (A. 18a). At the time the conversations were recorded, the agents were operating under a wiretap warrant authorizing only the seizure of evidence relating to Dorfman's purported "hidden interests" in Las Vegas casinos.

The Court rejected defendants' claim that, because the incriminating nature of the conversations was not apparent as of the time they were "seized" and recorded, they could not properly be subjected to subsequent review and analysis, or to introduction at trial.[17] The Court held that once the agents were "lawfully in a position to observe" the conversations, all privacy interest in them was lost and the government could make whatever subsequent use of them it wished (A. 18a). Further, the Court doubted whether the plain view doctrine was applicable at all to electronic interceptions of conversations (A. 17a). The Court below misapprehended both the essential nature of the plain view doctrine and this Court's opinion in *Illinois* v. *Andreas*, 103 S.Ct. 3319, 3324 (1983).

Under this Court's recent decision in *Texas* v. *Brown*, 460 U.S. 730 (1983), an item in plain view may be seized only

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[16] See footnote, 13, *supra*.

[17] On appeal, Petitioner Lombardo adopted in his brief all arguments of co-defendants which were applicable to his case. The thirty-three conversations at issue include two to which Petitioner was a party, and numerous others introduced against him to prove the existence of the conspiracy.

if, *as of the time of seizure*, there is probable cause to associate the item with criminal activity. 460 U.S. at 741-742. The probable cause requirement was not eliminated by *Illinois* v. *Andreas, supra*. There, the court held that "once a container *has been found to a certainty* to contain illicit drugs," it is like an object seized within the plain view doctrine, and a subsequent search of the container invades no privacy interest of the owner. 103 S.Ct. at 3324 (emphasis added). The permissibility of the search does not depend solely on the object's visibility to the police; rather, it is premised on the combination of visibility and apparent criminality which together constitute "plain view."

The opinion below ignored the "probable cause" element of the plain view doctrine when it held that government agents could not simply record the conversations, but review, analyze, and introduce them despite their apparent innocence as of the time of seizure.

If the court below were correct, the plain view doctrine would be eviscerated, and the particularity requirement of the Warrant Clause eliminated. So long as an officer could obtain a warrant — any warrant — he could obtain entry to the premises or access to the conversations of his target, and then seize every single object he came across in hopes that later analysis would reveal something illegal, regardless of the connection of that something to the charges specified in the warrant.

The decision of the court below permitting the seizure and later analysis of evidence which does not on its face present obvious evidence of criminality also conflicts with decisions of other circuits holding that the incriminating nature of the evidence must be immediately apparent. *United States* v. *Wright*, 667 F.2d 793, 799 (9th Cir. 1982); *United States* v. *Clark*, 531 F.2d 928, 932 (8th Cir. 1976); *United States* v. *Gray*, 484 F.2d 352, 356 (6th Cir. 1973) *cert. denied* 414 U.S. 1158 (1974).

IV. The Court of Appeals Erred in Upholding the March 1 Extension Application Despite the Application's Failure to Include a Statement of Results as Required by 18 U.S.C. § 2518(1)(f).

Defendants argued to both the District Court and the Court of Appeals that the March 1, 1979 extension application was invalid because it failed to include "a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results," as required by 18 U.S.C. § 2518(1)(f).[18] Both courts found that the March 1 application did not contain the statutorily-required statement.[19] Both Courts upheld the validity of the March 1 application, however, on the ground that it could have qualified as an original application rather than an extension (A. 10a, 81a).

That holding squarely conflicts with this Court's decision in *United States* v. *Giordano*, 416 U.S. 505 (1974). In that case, an extension application was invalidated where it included a statement of results which was dependent on evidence illegally obtained pursuant to the initial order. The court emphasized that "[*h*]*ad* [*the statement of results*] *been omitted no extension order at all could have been granted.*" *Id.* at 532 (emphasis added).

In dissent, Justice Powell took precisely the position espoused by the court below, arguing that the extension application should have been upheld because it contained sufficient untainted evidence to have supported approval as an original grant. The majority squarely rejected this argument, holding:

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[18] On Appeal, Petitioner Lombardo adopted in his brief all arguments of co-defendants which were applicable to his case. The March 1 wiretap authorization specifically named petitioner as a target whose conversations were sought to be overheard. At trial, fourteen conversations recorded as a result of the March 1 authorization were introduced.

[19] The District Court held: "The government's application did not contain the required explanation" (A. 78a). The Court of Appeals held: "There is a good reason to doubt that the brief reference to Dorfman's absence was sufficient to satisfy 18 U.S.C. § 2518(1)(f)" (A. 9a).

> But whether or not the application, without the facts obtained from monitoring Giordano's telephone, would independently support original wiretap authority, the Act itself forbids extensions of prior authorizations without consideration of the results meanwhile obtained.

Id. at 533.

The court below ignored this holding. The statement of results is a critical link in the statutory scheme of the Wiretap Act. If the required statement may be dispensed with or omitted at the government's whim, then every application may be treated as an initial one, regardless of how many months of unproductive wiretapping have already elapsed. Judicial supervision of continuing wiretap operations, provided for by statute, would be meaningless. There would be no way to evaluate continuing wiretap operations, or to terminate protracted but unsuccessful ones. This Court recognized the importance of the statement of results in *Giordano*; the judgment below should be reversed for its failure to comply with that decision.

Conclusion.

This case strikingly presents the question whether in a prosecution for conspiracy to bribe, the government must prove that one defendant who knows that something of value is being offered to a Senator must also know that other defendants illegally intend to use that something as an inducement to influence the Senator's official actions. The case also presents an appropriate opportunity for this Court to define the phrase "reckless disregard for truth" left open by its decision in *Franks* v. *Delaware*.

It is a central irony of this case that the Petitioner is currently imprisoned and serving a fifteen year sentence based on a *lower* standard of knowledge than that imposed by the court below on the governmental agents who submitted the misleading wiretap affidavits. This Court should grant the Writ of Certiorari to decide the important questions of law and conflicts among the circuits presented herein.

Respectfully submitted,

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